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Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of ) MM Docket No. 86-440  
ACHERNAR BROADCASTING COMPANY ) File No. BPCT-860410KP  
and )  
LINDSAY TELEVISION, INC. ) File No. BPCT-860410KQ  
For Construction Permit for a new )  
Television Station, Channel 64, )  
Charlottesville, Virginia )  
To: The Commission

CONSOLIDATED REPLY TO OPPOSITIONS  
(Exhibits separately bound)

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	i
Table of Authorities.....	ii
I. Summary.....	1
II. Introduction.....	2
III. Reply to opposition of the Mass Media Bureau.....	4
A. Channel 19.....	4
B. Channel 64.....	8
IV. Reply to opposition of W19BB.....	12
Exhibits (separately bound):	
1 Radio Frequency Analysis for Channel 18	
2 Lines on Exhibit 1, Virginia Licenses	
3 Engineering Statement, Clarence M. Beverage	
4. Public Safety Radio Communications Plan For Region 42	
5. Comparative Program Schedules, Charlottesville Noncommercial Translators	

## TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Court Decisions:</u>	
<u>Achernar Broadcasting Company v. FCC,</u> 62 F.3d 1441 (D.C.Cir. 1995).....	2
<u>Bechtel v. FCC,</u> 10 F.3d 875 (D.C.Cir. 1993).....	5
<u>FCC v. WNCN Listeners Guild,</u> 450 U.S. 582 (1981).....	5
<u>McLouth Steel Products Corp. v. Thomas,</u> 838 F.2d 1317 (D.C.Cir. 1988).....	5
<u>Pacific Gas &amp; Electric Co. v. FPC,</u> 506 F.2d 33 (1974).....	5
<u>Panhandle Producers &amp; Royalty Owners Ass'n</u> <u>v. Economic Regulatory Admin.,</u> 822 F.2d 1105 (D.C.Cir. 1987).....	5
 <u>Administrative Decisions:</u>	
<u>Advanced Television Systems, Memorandum Opinion</u> <u>and Order on Reconsideration of the Sixth Report</u> <u>and Order,</u> FCC 98-24, released February 23, 1998.....	7
<u>Advanced Television Systems, Sixth Report and Order,</u> 12 F.C.C. Rcd 14588 (1997).....	5, 7, 8
<u>Channel 16 of Rhode Island, Inc.,</u> 31 F.C.C.2d 574 (1971).....	15
<u>Further Sharing of the UHF Television Band</u> <u>by Private Land Mobile Radio Services,</u> 101 F.C.C.2d 852, 859 (1985).....	7
<u>Land Mobile Use of TV Channels</u> (Docket 18261), 23 F.C.C.2d 325, 19 R.R.2d 1585 (1970).....	5
<u>Order,</u> PR Docket No. 91-300, DA 91-1535, released December 20, 1991.....	10
<u>Public Safety National Plan,</u> 3 F.C.C. Rcd 905 (1989).....	9
<u>Report and Order,</u> BC Docket 78-253, 47 Fed. Reg. 21468, 51 R.R.2d 476 (1982).....	13, 14

<u>Report and Order</u> , ET Docket 97, 12 F.C.C. Rcd 22953 (1998).....	3, 4, 15
<u>Sixth Further Notice of Proposed Rulemaking</u> , 11 F.C.C. Rcd 10968 (1996).....	15
<u>Waiver of Parts 2 and 90 of the Commission's Rules to Permit New York Metropolitan Area Public Safety Agencies to Use Frequencies 482-488 MHz on a Conditional Basis</u> , 77 R.R.2d 584 (1995).....	8, 11
 <u>Statutes:</u>	
Balanced Budget Act of 1997, 47 U.S.C. 309(l).....	3
 <u>Regulations:</u>	
47 C.F.R. §2.106, NG66.....	5
47 C.F.R. §73.607.....	12, 15
47 C.F.R. §73.623(c).....	12, 13
47 C.F.R. §73.3522(b).....	12, 15
47 C.F.R. §73.3584(b).....	13
47 C.F.R. §§90.301-317.....	5
 <u>Other:</u>	
Public Safety Radio Communications Plan for Region 42.....	10

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To: The Commission

CONSOLIDATED REPLY TO OPPOSITIONS

1. Achernar Broadcasting Company ("Achernar") and Lindsay Television, Inc. ("Lindsay"), whose merger as Charlottesville Broadcasting Corporation ("Charlottesville Broadcasting") is pending before the Commission, reply to the oppositions filed by Shenandoah Valley Educational Television Corporation, licensee of translator station, W19BB, at Charlottesville, Virginia ("W19BB") and the Mass Media Bureau.

I.  
Summary

2. Following remand from the court, the Commission has directed its Mass Media Bureau to work with the parties to resolve the impasse in this case. Instead, the Bureau would dismiss the proposed use of channel 19 without analysis of a decades-old land mobile-UHF sharing policy statement. Analysis of the land mobile use of channel 18 frequencies in the Washington area demonstrates that no harm will occur by the proposed adjacent channel broadcast operation in Charlottesville.

3. The Commission now has a choice for resolution of the

impasse, either of which serves the public interest. The use of channel 19 is fully consistent with accommodation of both land mobile and broadcasting services. The use of channel 64 during the period until conversion to digital television operation is fully consistent with accommodation of both public safety and broadcasting services.

4. The inauguration of Charlottesville's second local television service and the provision of service to white and gray areas and populations constitute a controlling Section 307(b) choice over the loss of one of two television translators providing substantially duplicated public television programming from distant markets.

## II. Introduction

5. This proceeding began in 1986 when Lindsay, Achernar and others filed applications to provide Charlottesville with its second local transmission service on channel 64, which had been allotted to that community since 1953. In 1991, after two hearings and dismissal of competing applications, the Commission denied both applications because of the objections of the National Radio Astronomy Observatory ("NRAO" or "Observatory") that the operation of the station would interfere with NRAO's radio astronomy observations at Green Bank, West Virginia.

6. On appeal, the Court of Appeals held the denial incompatible with the Communications Act and remanded the proceeding. Achernar Broadcasting Company v. FCC, 62 F.3d 1441 (D.C.Cir. 1995). After remand, the Commission issued an Order,

FCC 95I-24, released October 6, 1995, seeking "assist[ance] ... in its deliberations" from "the parties, including NRAO and the Mass Media Bureau,...as to what further action should be taken in this proceeding." In response to that Order, the applicants and NRAO undertook, with the concurrence and guidance of the Commission's staff, to resolve the proceeding without the need for further hearing.

7. That undertaking led to a proposal resolving the applicants' differences with NRAO and permitting the coexistence of the Observatory and the prospective licensee. As a result of the agreement with NRAO, the applicants entered into a settlement agreement providing for a merger of the applicants into a new entity, Charlottesville Broadcasting Corporation. The agreement was filed with the Commission on January 30, 1998, within the six month time for filing settlements of long-standing FCC cases mandated by Congress in the Balanced Budget Act of 1997, codified at 47 U.S.C. 309(1).

8. Contemporaneously with that filing, on January 6, 1998, the Commission's Report and Order, ET Docket 97, 12 F.C.C. Rcd 22953, deleted channel 64, Charlottesville, and promised that pending applicants such as Petitioners would be given "an opportunity to amend their applications...to seek a channel below channel 60." 12 F.C.C. Rcd at 22971-72 (¶40). The Commission went on to say that "We will thereafter dismiss any applications...that are not satisfactorily amended." Id. In response to the action in ET Docket 97-157, Petitioners undertook

an extensive search for a substitute channel; the only available alternative found was channel 19.

9. Considering that the Petitioners have been displaced from channel 64 some 11 years after their applications were filed, it is ironic that the Mass Media Bureau, formally asked by the Commission to assist Petitioners in resolution of this proceeding, now opposes the amendment to channel 19 because of the 1970 allocation of adjacent channel 18 to land mobile service and a 28 year old freeze on television applications on the channel.<sup>1</sup> The objection, however, is based on form rather than substance. As demonstrated below, Petitioners' proposed channel 19 operation would not in fact cause interference to any of the more than 1,000 land mobile stations currently operating on channel 18 and any potential interference to any future operators could be avoided through reasonable engineering approaches which Petitioners would willingly undertake.

### III.

#### Reply to opposition of the Mass Media Bureau

##### A.

#### Channel 19

10. The Bureau's two-page pleading dismisses the effort of Charlottesville Broadcasting to resolve the impasse in this mega-year proceeding by a summary, nonanalytical citation to the freeze order issued 28 years ago referring to a 140 mile adjacent

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<sup>1</sup> No such "freeze" exists for low power television applications or DTV operation. For those services the Commission instead has adopted interference standards which Petitioners' proposed operation would satisfy.



channel spacing requirement that was not then, and never has been, adopted as an agency rule with supporting reasoned analysis. Land Mobile Use of TV Channels (Docket 18261), 23 F.C.C.2d 325, 19 R.R.2d 1585, ¶51 and Appendices C and D (1970), relied on in the Bureau's opposition; see, 47 C.F.R. §2.106, NG66; 47 C.F.R. §§90.301-317; see, also, Advanced Television Systems, Sixth Report and Order, 12 F.C.C. Rcd 14588 (1997), referring to "spacing standards derived from policy statements in Docket 18261," 12 F.C.C. Rcd at 14658 (¶152 and n. 275).

11. The price to the agency to proceed on the basis of a policy, rather than a rule, is that the policy "is subject to complete attack before it is finally applied in future cases." Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38-39 (D.C.Cir. 1974); Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin., 822 F.2d 1105, 1111 (D.C.Cir. 1987). If the agency has previously ruled on a challenge to the policy with reasoning that remains applicable and adequately refutes the challenge at issue, the agency may rely on the policy and need not make needlessly redundant rulings. However, the agency must always stand ready "to hear new argument" and "to reexamine the basic propositions" undergirding the policy. Bechtel v. FCC, 10 F.3d 875 (D.C.Cir. 1993); McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1321 (D.C.Cir. 1988); see, also, FCC v. WNCN Listeners Guild, 450 U.S. 582, 603 (1981). This, we ask the Commission to do here.

12. During the past 28 years, land mobile use of channel 18

allotted to the Washington-Baltimore area has evolved to that reflected in the listing of licenses set forth in Exhibit 1.<sup>2</sup> There are approximately 1,165 licenses, distributed approximately 792 in Maryland including Baltimore, 178 in the District and 205 in northern Virginia.<sup>3</sup> Approximately 82% (166) of licenses in northern Virginia are for integral parts of the metropolitan area, nearer to the DC center reference point than the perimeter of the 50 mile radius to the south and west in the direction of Charlottesville; approximately 8% (17) are a scattering of licenses in more outlying communities such as Haymarket, Warrenton, Middleburg and Leesburg; the remaining approximately 10% (22) are licenses in the Winchester area, shielded by the Blue Ridge Mountains.<sup>4</sup>

13. The Petitioners' consulting engineer, Clarence M. Beverage, has plotted the pertinent 39 dBu contours of the existing licensed facilities of these land mobile operations. He has also plotted the pertinent 64 dBu contour of Charlottesville Broadcasting's proposed operation on channel 19. His findings and conclusions are set forth in Exhibit 3. In his opinion, the proposed operation on channel 19 will not cause interference to

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<sup>2</sup> This list has been compiled from records of Wireless Bureau frequencies for the third quarter of 1997 for the 494-500 MHz band within a 50 mile radius of the reference point in Washington, D.C. in 47 C.F.R. §90.303.

<sup>3</sup> These may be found in Exhibit 1 in lines 1-205 (Virginia), 206-997 (Maryland) and 988-1165 (the District).

<sup>4</sup> In Exhibit 2, we have listed the line numbers on Exhibit 1 that identify licenses in each of these groupings.

any existing licensed land mobile operation with the possible exception of two pending applications that can be cured by the use of modern RF filters; also, that to the extent future land mobile development may take place, no interference will be caused that cannot be eliminated by engineering means which Charlottesville Broadcasting agrees to undertake.

14. Mr. Beverage's statement and opinions show that the 140 mile spacing announced in 1970 is not applicable to the specific facts of the use of channel 18 here 28 years later and in light of the many changes in technology during the past three decades increasing efficiency and narrowing interference potential. Indeed, the Commission acknowledges that its spacing requirements relative to UHF-land mobile sharing have been "conservative." Further Sharing of the UHF Television Band by Private Land Mobile Radio Services, 101 F.C.C.2d 852, 859 (1985); Advanced Television Systems, Sixth Report and Order, *supra*, 12 F.C.C. Rcd at 14664 (¶164); Advanced Television Systems, Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, slip op. FCC 98-24, released February 23, 1998, ¶130.

15. The Commission has also shown a disposition to be flexible and reasonable in the accommodation of broadcast and land mobile spectrum needs. In Further Sharing of the UHF Television Band by Private Land Mobile Radio Services, *supra*, the Commission proposed the use of narrowband technologies, digital techniques and adaptive antennas to reduce the "deliberately conservative" spacing requirements established at the outset of

the land mobile-UHF sharing policy. In Advanced Television Systems, Sixth Report and Order, supra, the Commission narrowed the 140 mile analog adjacent channel spacing policy to 110 miles, and additionally allotted ten digital channels with adjacent channel spacings as low 100 miles. 12 F.C.C. Rcd at 14658 (¶152), 14664 (¶164). In Waiver of Parts 2 and 90 of the Commission's Rules to Permit New York Metropolitan Area Public Safety Agencies to Use Frequencies 482-488 MHz on a Conditional Basis, 77 R.R.2d 584 (1995), the Commission permitted public safety agencies to utilize frequencies of an adjacent channel low power television station in the same market, recognizing that interference problems could be "resolved through standard engineering practices, including the use of radio frequency (RF) filtering." 77 R.R.2d at 587 (¶15-16).

16. We ask the Commission, in a similar vein, to deal with this case in a reasonable and pragmatic way, which the Mass Media Bureau has failed to do, and issue an Order to Show Cause why the channel for which Petitioners have applied should not be modified to specify channel 19, at long last resolving the 11-year litigation and impasse in the quest for a second local television service in Charlottesville, also serving white and gray areas and populations as reflected in the record and summarized in Mr. Beverage's statement (Exhibit 3).

B.  
Channel 64

17. Petitioners wish to make clear that they continue to press for retention of channel 64 in Charlottesville as an

alternative means for resolving this matter in the event, upon reconsideration, the Commission should deem that the preferred choice. The case for retaining channel 64 has previously been briefed, in our Joint Petition filed January 30, 1998 and Reply to the Bureau's Opposition to that Joint Petition filed February 25, 1998. We do not here reargue those presentations, except to add a footnote arising from our research in regard to the channel 19 alternative.

18. In support of retention of channel 64, Petitioners have argued that there is not a shortage of spectrum for public safety uses in the parts of Virginia pertinent to use of the channel in Charlottesville, located in central-western Virginia at the border of the Blue Ridge and Allegheny Mountain areas. There is further support for that position. The Commission has established regions, with their own governance and some autonomy to plan, coordinate and administer certain public safety radio needs in the 800 MHz band. Public Safety National Plan, 3 F.C.C. Rcd 905 (1989). One of those regions, reflecting a common identity of interest (No. 20), consists of the District of Columbia, Maryland and Northern Virginia including the tier of cities and counties that encompass all of the Virginia transmitting locations in Exhibit 1, lines 1-205, except the locations in the Winchester area shielded by the Blue Ridge Mountains. Charlottesville and the balance of Virginia, reflecting their own separate identity of interest, comprise an entirely different region (No. 42).

19. The Public Safety Radio Communications Plan for Region 42, filed with the Commission on March 11, 1991, is attached as Exhibit 4 for handy reference. That Plan states: "Region 42 differs from many other planning regions in that there is presently no outstanding backlog of demand for channels in the 800 megahertz portion of the spectrum throughout the vast majority of the geographic area encompassed." Exhibit 4 at page 5.

20. The Plan includes minutes of a meeting of interested parties which led to the adoption of the Plan, recorded in a question and answer format, containing the following passage:

Question: During this planning process between now and next summer whenever the plan is finalized, are governmental entities in Region 42 area to be asked to get their anticipated requirements for the future?

Answer: Yes, I would expect so. We are not requiring that now. In general in this region, I think the problem is most people don't see any reason for 800 at all. They certainly don't see it in the next 5 years and therefore, that's why we have such a relatively small turnout at these meetings. This is universal at all the regions except for the heavily populated areas (New York, Dallas, Los Angeles). In most areas of this region, there are still plenty of existing channels, not only 800, but the older bands. If we asked in general for people to submit plans now, I think we would get a response from a few specific areas and hear nothing from other areas, or something very unrealistic. This is just my opinion.

Exhibit 4 at page 43. After putting the Plan out for public comment, to which no comments dissenting from the foregoing statements were filed, the Commission approved the Plan. Order, PR Docket No. 91-300, DA 91-1535, released December 20, 1991, copy included as the initial page of Exhibit 4.

21. In support of retention of channel 64, Petitioners have

also argued that much if not all of the time period prior to conversion from analog to digital television operations will pass while the Commission, the public safety agencies and the equipment manufacturing and supply community adopt detailed regulations and protocols for the various different uses of the 24 megahertz of spectrum, develop governance and operational structures, establish standards for a wide range of equipment, design, test and manufacture the equipment, and commence operations. In the New York City waiver case cited earlier in ¶15, the Commission was willing to deal with the practicalities of the digital conversion time frame, granting a waiver for a minimum period of five years for public safety agencies to operate on a future digital television broadcast frequency. 77 R.R.2d at 587 (¶14).

22. An analogous case for waiver is presented here, i.e., operation on analog channel 64 until conversion to a digital channel during a time period when public safety use of that spectrum is in the R&D stage and in a region of the state where public safety spectrum has not been in short supply. In the event the national interoperability elements of public safety radio use of the channel 63-64-66-67 bands (a) employ the channel 64 band for that purpose and (b) proceed to the point where implementation of the national interoperability program is in fact blocked by the analog broadcast use of the channel prior to Charlottesville Broadcasting's conversion to DTV operation, Charlottesville Broadcasting would be willing to discuss with the

Commission the possible change of its analog broadcast operation to channel 19 for the limited interim time period then remaining prior to digital conversion.

## IV.

Reply to opposition of W19BB

23. Aside from the comments of the Mass Media Bureau, an opposition was filed by Shenandoah Valley Educational Television, the licensee of noncommercial station WVPT(TV), Staunton (Harrisonburg), Virginia, and translator station W19BB, Charlottesville. While translator channel 19 is neither a full service station nor a local outlet for Charlottesville, Shenandoah Valley argues that it, as a small noncommercial station, needs the fund raising revenue generated by the Charlottesville-Albemarle County audience to retain the financial capacity to "meet its...mission." As evidence of the need for W19BB, Shenandoah Valley points to its efforts in the DTV proceeding to change its main channel allocation to channel 11 to protect its continued use of the channel 19 translator.

24. Shenandoah Valley also argues that Petitioners are precluded from asking the Commission to change their channel assignment from channel 64 to channel 19 because the request would violate Section 73.607 and the amendment specifying a new channel does not meet the Section 73.3522(b) standard for engineering amendments.<sup>5</sup> Thus, Shenandoah Valley argues,

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<sup>5</sup> Shenandoah Valley also claims that the proposed use of channel 19 does not comply with the applicable DTV/NTSC separation set forth in Section 73.623(c) of the Rules, a matter already fully addressed in Appendix 1, pages 2-3 of the



Petitioners' request constitutes a major amendment which should be treated as a new application. And, since the Commission determined in the DTV proceeding that no new NTSC applications may be filed after September 20, 1996, Petitioners' proposed amendment to channel 19 is "time-barred."

25. Neither Shenandoah Valley's "special circumstances" pleading nor its procedural objections to Petitioners' request is meritorious. The priorities of spectrum allocation foreclose Shenandoah Valley's "special circumstances" argument: Full service stations such as that proposed by Petitioners have priority over television translators. Report and Order, BC Docket 78-253, 47 Fed. Reg. 21468, 51 R.R.2d 476, 488 (1882). No exception is allowed for alleged "need" or the noncommercial nature of the primary station.<sup>6</sup> Indeed, given the secondary status of television translators, it is questionable that Shenandoah Valley has standing to object to Petitioners' request: Since all translator operators seek operating authority from the Commission subject to the long prevailing allocation condition that they are subject to displacement by full service stations,

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Engineering Statement appended to Petitioners' Supplement. As demonstrated in that Statement, using the minimum distance separation set forth in Section 73.623(c), there will be no interference to DTV channel 19, Portsmouth, Virginia if Petitioners operate as proposed on channel 19, Charlottesville.

<sup>6</sup> Moreover, while the matter is rendered irrelevant by the dispositive allocations principle, Shenandoah Valley makes no factual showing of its claimed need for channel 19; nor has it submitted its claims under the sworn statement of a person with personal knowledge, a fatal omission under Section 73.3584(b) of the Rules.

any economic harm claimed would not be cognizable. Shenandoah Valley's suggestion that Charlottesville's need for a second local station is outweighed by WVPT's fund raising practices was thus foreclosed by the 1982 Report and Order, supra.

26. In any event, even if such a weighing were permissible, and even if the argument were couched in terms of Charlottesville's need for service rather than WVPT's desire for access to Charlottesville viewers' cash contributions, the balance in this case would necessarily be with Petitioners: Shenandoah Valley's translator is one of two noncommercial reception services presently available to Charlottesville (both Richmond Channel 23 and Staunton's Channel 51 serve Charlottesville via translators), while Charlottesville has but one local television transmission service of any kind. Moreover, a review of the programs broadcast by the two noncommercial translators indicates a very substantial duplication of offerings by the Richmond and Harrisonburg stations, with the primary difference being that of time shifting.<sup>7</sup>

27. Shenandoah Valley's procedural arguments are similarly flawed: In the Supplement to the Joint Petition for Approval of Settlement Agreement, Petitioners demonstrated the

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<sup>7</sup> A comparison of the July 18-24, 1998 program schedules of channel 23, Richmond, and channel 51, Harrisonburg, which operate translators on channel 41 and channel 19, respectively, in Charlottesville, is appended as Exhibit 5. These schedules are taken from TV Guide, which, while not necessarily reliable for the depiction of a single given program, due to last minute schedule changes, is reliable for an overview of the week's program schedule as used here.

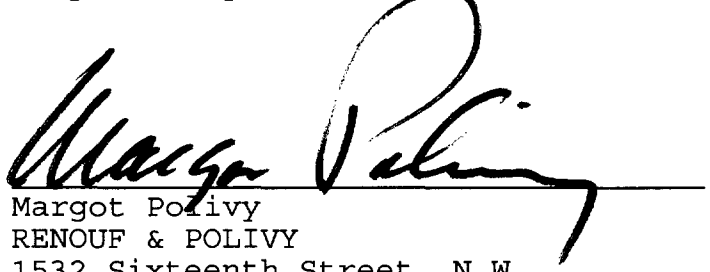
appropriateness of waiver of Section 73.607 of the Rules and, alternatively, noted that the Commission could, in its discretion, order the channel change from 64 to 19 on its own motion. Contrary to being "time-barred" by the DTV freeze, the Commission specifically protected applicants filing before September 20, 1996 from that freeze. Sixth Further Notice of Proposed Rulemaking, 11 F.C.C. Rcd 10968 (1996). Petitioners' applications have been pending since 1986, ten years before the freeze. Unfortunately, and through no fault of theirs, the Petitioners were dispossessed of channel 64 due to the Commission's supervening reallocation of channels 60-69. Report and Order, 12 F.C.C. Rcd 22953, released January 8, 1998, supra. At paragraph 40 of that 60-69 reallocation Report and Order, however, the Commission specifically said that it would provide applicants such as Petitioners "an opportunity to amend their applications...to seek a channel below channel 60." Obviously the Commission did not intend to then bar such amendments as violative of Section 73.607 or out of compliance with the engineering amendment standard of Section 73.3522(b).

28. Channel changes occasioned by supervening Commission allocations decisions are not unusual. Thus, for example, in the case of Channel 16 of Rhode Island, Inc., 31 F.C.C.2d 574 (1971), the Commission, on its own motion, issued an Order to Show Cause why Channel 16's construction permit should not be modified to

specify operation on channel 64.<sup>8</sup> Here, the Commission's authority under Sections 303 and 312 of the Communications Act to make such a change prior to issuing a construction permit is clear and would require no further proceedings in view of the applicants' concurrence.

29. Shenandoah Valley has no valid basis for objection. Grant of Petitioners' request would provide Charlottesville its second local full service television station, serving white and gray areas and populations, without depriving the Charlottesville area of noncommercial service via translator on channel 41. Petitioners have acted diligently and expeditiously to locate an alternate channel and Shenandoah Valley's objections are no more than the complaints of a disappointed squatter objecting to occupancy by a rightful resident. There is no such thing as adverse possession of a broadcast frequency.

Respectfully submitted,

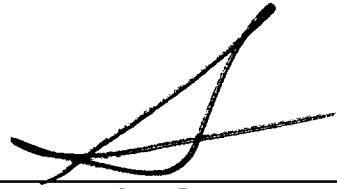


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<sup>8</sup> In that case the channel change was made to permit land mobile operation on channel 16. Here, Petitioners have been required to vacate channel 64 to permit land mobile expansion to channel 64, and seek substitution of channel 19.

A handwritten signature in black ink, appearing to be 'G. Bechtel', written over a horizontal line.

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July 27, 1998

CERTIFICATE OF SERVICE

I, Gene A. Bechtel, certify that I have this 27th day of July 1998 caused true copies of the foregoing CONSOLIDATED REPLY TO OPPOSITIONS and EXHIBITS TO CONSOLIDATED REPLY TO OPPOSITIONS to be hand delivered or placed in the United States mail, first class, postage prepaid, addressed to the offices of the following:

Via hand delivery

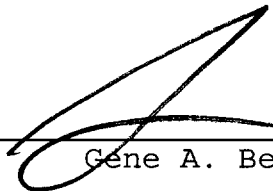
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